UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN EXPRESS COMPANY and its subsidiary
AMEX CARD SERVICES COMPANY

and Case 28-CA-123865

ERANDI ACEVEDO, JENNIFER FLYNN, and
JOHNATHAN LONGNECKER, Individuals

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE NATIONAL LABOR RELATIONS BOARD

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This case involves an Employment Arbitration Policy and Policy Acknowledgement Form (collectively "Arbitration Policy") which interfere with employees' access to the Board and require them to waive the right to maintain class or collective actions in any forum, arbitral or judicial. Such policies fall squarely within the ambit of the Board's decisions in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), and *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.2d 344 (5th Cir. 2013), which prohibit employers from imposing policies or agreements precluding employees from pursuing employment related collective claims as a condition of employment. Consequently, the Board has a strong and well-grounded interest in prohibiting the Arbitration Policy in order to protect the Section 7 rights of affected employees. After consideration and review of the arguments, Counsel for the General Counsel (CGC) respectfully requests that the Board issue a Decision and Order prohibiting the promulgation of the Arbitration Policy, addressing its effect on employees, and proscribing enforcement.

I. PROCEDURAL HISTORY

On May 22, 2014, the Regional Director for Region 28 issued the underlying Complaint and Notice of Hearing against Respondent. The Complaint alleges that American Express Company (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and enforcing the Arbitration Policy. On March 18, 2015, the National Labor Relations Board issued an Order Approving Stipulation, Granting Motion, and Transferring Proceeding to the Board in Case 28-CA-123865. The Board did so pursuant to a joint motion filed by the CGC, Respondent , and Charging Parties Erandi Acevedo, Jennifer Flynn, and Johnathan Longnecker (collectively Charging Parties). Pursuant to that Order and Section 102.35(a)(9) of the Board's Rules and Regulations, CGC submits the following brief.

II. ISSUES PRESENTED

1. Whether Respondent's maintenance and enforcement of its Arbitration Policy interferes with, restrains, or coerces employees in the exercise of the rights guaranteed under Section 7 of the Act in violation of Section 8(a)(1) of the Act.
2. Whether the Board's *D.R. Horton* decision was properly issued.
3. Whether the Charge is time-barred under Section 10(b) of the Act.

III. STATEMENT OF FACTS

Respondent is a corporation with an office and place of business in Phoenix, Arizona, where it is engaged in the business of providing credit card services to customers. (Joint Motion P. 2(c)).[1] Charging Parties began working for Respondent on different dates and left the company in October and September 2013. Erandi

[1] Citations to the joint motion and stipulated record filed October 10, 2014 are denoted as Joint Motion, Joint Exhibit, and abbreviated thereafter as Jt. Mot. and Jt. Ex.

Acevedo (Acevedo) was hired on or about June 18, 2012 and fired on October 10, 2013. Jennifer Flynn (Flynn) was hired on or about September 4, 2012, and fired on September 17, 2013. Johnathan Longnecker (Longnecker) worked from on or about September 17, 2012 to September 17, 2013. (Jt. Mot. P. 2(g)). While working for Respondent, Charging Parties were assigned to help operate a "call center" at Respondent's Phoenix facility. (Jt. Mot. P. 2(g)). On each of their respective hiring dates, Charging Parties were required to sign and date a New Hire Employment Arbitration Policy Acknowledgement Form. (Jt. Mot. P. 2 (i)(2)). That form, which was in existence and maintained by Respondent at all material times, described and specifically referred to Respondent's Employment Arbitration Policy. (Jt. Mot. P. 2(i)(1)-(3), Joint Exhibit 3). The Employment Arbitration Policy contains the following pertinent language (emphasis in original):[2]

> **A. Covered Parties and Effective Date**
>
> The obligation to arbitrate under this Policy extends to all individuals who applied for a U.S. position with the Company on or after June 1, 2003 and to all U.S. employees hired on or after June 1, 2003 who signed an Employment Arbitration policy Acknowledgement Form (Covered Hires). The Policy goes into effect on June 1, 2003 for all covered Hires.
>
> All U.S. employees who are not Covered Hires, are covered under the Policy unless they exclude themselves by returning a properly completed Arbitration Opt-Out Form to the Company postmarked within the prescribed 45 day time period ("Covered Incumbent Employees"). For Covered Incumbent Employees, this Policy is effective the day after the expiration of the prescribed 45-day Opt-Out period.

[2] Pursuant to the Joint Motion and Stipulation of Facts submitted by the parties on October 10, 2014, the parties have stipulated that Joint Exhibit 2 contains two versions of Respondent's Arbitration Policy. Both versions contain identical content but differ with respect to formatting and page numbering.

For those individuals covered by the Policy, the obligation to arbitrate pursuant to the Policy exists both during employment and after their employment with the Company ends.

* * *

C. Claims Not Covered

Claims not subject to arbitration under this Policy are as follows:

1. any criminal complaint or proceeding;

2. any claim covered by state unemployment insurance, disability and/or workers' compensation;

3. any action for emergency or temporary injunctive relief in a court of law in accordance with applicable law, so long as that action is brought on an individual basis and not on a consolidated basis or on behalf of or as part of a collective or class action (a class action involves an arbitration or lawsuit where representative members of a group who claim to share a common interest seek relief on behalf of the group);

4. any claim under the National Labor Relations Act;

5. any dispute that fails to state a claim upon which relief may be granted under applicable law. An arbitrator or a court of law with jurisdiction shall dismiss without a hearing on the merits, any matter that does not state a claim under applicable federal, state or local law; and

6. any claim that has been asserted in a litigation that is pending in court prior to the applicable effective date, as set forth in Section II.A. of this Policy.

* * *

D. Individual Claims Only

(1) All claims subject to arbitration under this Policy **MUST** be submitted on an individual basis. **THERE SHALL BE NO RIGHT OR AUTHORITY FOR ANY CLAIMS TO BE ARBITRATED ON A CLASS OR COLLECTIVE BASIS.** Claims may not be joined or consolidated in arbitration with disputes brought by or against

> another individual, the Company or certain Company employee benefit plans, unless agreed to it writing by all parties. No party subject to this Policy shall have any right to participate in a representative capacity or as a member of any class of claimants in a court of law pertaining to any claims subject to arbitration.
>
> * * *
>
> The arbitrator's authority to resolve disputes is limited to disputes between: a) an individual and American Express or an American Express employee benefit plan (including retirement, health and/or welfare plans or arrangements) alone; or b) the individual and an another individual covered by this Policy alone and the arbitrator's authority to make awards is limited to those parties alone. No arbitration award or decision will have any preclusive effect as to issues or claims in any dispute with anyone who is not a named party to the arbitration.

(Jt. Ex. 2). Respondent is also maintaining the following pertinent language in its New Hire Employment Arbitration Policy Acknowledgement Form (emphasis in original):

> NEW HIRE EMPLOYMENT ARBITRATION POLICY ACKNOWLEDGEMENT FORM
>
> I acknowledge that I have received and been given the opportunity to review the American Express Company Employment Arbitration Policy (the "Policy"). I understand that arbitration is the final and exclusive forum for the resolution of all employment-related disputes between American Express and me that are based on a legal claim.
>
> * * *
>
> I understand and agree that I shall have no right or authority for any claims to be arbitrated on a class action basis or on bases involving claims brought in a representative capacity on behalf of any other employees or other persons similarly situated; provided, however, that my individual claim would be subject to this arbitration provision. Claims brought by or against another employee, a Company employee benefit plan or the Company may not be joined or consolidated in the arbitration with claims brought

> by or against any other employee, Company employee benefit plan or the Company, unless otherwise agreed to in writing by all parties. Further, I agree that I will not have the right to participate in a representative capacity or as a member of any class of claimants in a court of law pertaining to any claims subject to arbitration.
>
> * * *
>
> I agree to submit any and all employment related disputes based on a legal claim to arbitration, and agree to waive my right to trial before a judge or jury in federal or state court in favor of arbitration under this policy.

(Jt. Ex. 3).

Since at least February 24, 2014, Respondent has enforced the provisions of the Arbitration Policy by moving to compel arbitration in a cause of action brought by five former employees in Case No. CV-14-00069-PHX, in the United States District Court for the District of Arizona. (Jt. Mot. P. 3(k)). Respondent's motion to compel arbitration was subsequently granted on May 28, 2014. (Jt. Mot. P. 3(k), Jt. Ex. 5).

Respondent promulgated the Arbitration Policy and currently maintains the policy for all employees hired since January 1, 2003 at its Phoenix, Arizona facility, and retains the option under the Arbitration Policy to enforce its terms against employees. (Jt. Mot. P. 2(j)). It is also undisputed that Respondent sought to enforce the provisions of the Arbitration Policy by moving to compel arbitration in the cause of action filed by Charging Parties. (Jt. Mot. P. 2(k)).

IV. ARGUMENT AND ANALYSIS

1. Respondent's Arbitration Policy Violates Section 8(a)(1) of the Act.

a. The Class Action Waiver Violates The Act Because It Requires Employees To Waive Collective Rights In All Forums, Arbitral Or Judicial.

Applicable Board law states that an employer may not prohibit employees from filing joint, class, or collective claims as a condition of employment. In *Murphy Oil*, the Board affirmed *D.R. Horton*, 357 NLRB No. 184 (2012), holding that an employer violates the Act when it "requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." 361 NLRB No. 72, slip op. at 9.

Paragraph D of Respondent's Arbitration Policy contains a class action waiver barring employees from filing class or collective claims and requiring employees to litigate all claims individually. The Arbitration Policy states that employees must agree that "all claims subject to arbitration under this policy must be submitted on an individual basis." Based on this language, the Arbitration Policy is unlawful because it interferes with employees' Section 7 rights to collectively improve working conditions through "resort to administrative or judicial forums." Id., slip op. at 1 (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978)); see also *D.R. Horton*, 357 NLRB No. 184, slip op. at 3 (holding that employees who join together to bring employment-related claims on a class-wide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the

NLRA.). Consequently, Respondent's Arbitration Policy violates Section 8(a)(1) of the Act.

b. The Arbitration Policy Also Violates The Act Because It Contains Overly Broad Language That Would Tend To Inhibit, Coerce, Or Restrict A Reasonable Employee From Using The Board's Processes Or Engaging In Section 7 Activity.

Under Board law, a work rule may violate Section 8(a)(1) of the Act if it "reasonably tends to chill employees in the exercise of their Section 7 rights." *Lutheran Heritage Village*, 343 NLRB 646, 646 (2004). In making such a determination, the Board follows a two-step inquiry. First, a rule is unlawful if it explicitly restricts activities protected by Section 7. Second, "[i]f the rule does not explicitly restrict activity protected by Section 7," it is still unlawful if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647.

Under these facts, Respondent's Arbitration Policy plainly restricts Section 7 activity and, as a condition of their employment, interferes with employees' rights to participate in class or collective legal action. The Arbitration Policy directly states that employees have "no right or authority for any claims to be [resolved] on a class or collective basis." (Jt. Ex. 2). The policy goes on to state that covered employees have no right "to participate in a representative capacity or as a member of any class of claimants in a court of law pertaining to any claims subject to arbitration." (Jt. Ex. 2). This broad and excessive language, and other language included throughout the Arbitration Policy, continually references the policy's coverage of any

claim filed by an employee. In fact, the New Hire Employment Arbitration Policy Acknowledgement Form, provided when employees join the company, states that "the employment related disputes subject to arbitration under the Policy include any claims arising under any federal, state or local statute, regulation or common law doctrine." (Jt. Ex. 3). The document includes a list of 11 bulleted federal and state employment statutes, and states that the policy covers any claim "including but not limited to [the claims on the list]." (Jt. Ex. 3).

In *U-Haul Company of California*, 347 NLRB 375 (2006), enfd. mem. 255 F. Appx. 527 (D.C. Cir. 2007), the Board applied the *Lutheran Heritage Village* test and held that an arbitration agreement was unlawful because it restricted access to Board processes. The arbitration agreement in *U-Haul* applied to "any other legal or equitable claims and causes of action recognized by local, state, or federal law or regulations." 347 NLRB at 377; see also *2 Sisters Food Group, Inc.*, 357 NLRB No. 168 (2011); *Bill's Electric*, 350 NLRB 292, 296 (2007). The Board reasoned that the Employer's language "reasonably includes the filing of unfair labor practice charges with the Board, and thus employees could reasonably believe they are precluded from filing such charges with the Board." Id.

The language in the present case is similar to the language in *U-Haul*. Paragraph 2 of the New Hire Employment Arbitration Policy Acknowledgement Form states that the arbitration agreement applies, "[to] any claims arising under any federal, state, or local statute, regulation or common law doctrine regarding or relating to employment discrimination, terms and conditions of employment, or

termination of employment." (Jt. Ex. 3). Consequently, the language in the Agreement also reasonably includes filing an unfair labor practice charge. In *U-Haul*, the Board reasoned that "the breadth of the policy language, referencing the policy's applicability to causes of action recognized by 'federal law or regulations,' would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board." Id. Here, Respondent's language is as broad as the language in *U-Haul*. The Arbitration Policy encompasses "any federal, state, or local statute, regulation or common law doctrine" and asks employees to make nuanced differentiations between what is covered and not covered. As a consequence, a reasonable employee could easily construe such language to prevent access to the Board's processes and the rule is therefore unlawful.

Respondent does not cure its unlawful agreement by including a savings clause in Paragraph C of the Arbitration Policy. In *Murphy Oil*, the employer amended its arbitration agreement to include a statement that employees were not waiving their Section 7 right to commence group or collective action in court. The employer also included language stating that it would seek enforcement of the class action waiver. The Board concluded that the arbitration agreement remained unlawful despite the employer's inclusion of a "savings clause." The Board stated that, "Employees would reasonably read the Revised Agreement as merely stating that the Respondent will not retaliate against them if they file a class or collection action. The right to 'commence, or be a party to, or [act as a] class member in' the action itself remains waived." *Murphy Oil*, 361 NLRB No. 72, slip op. at 19.

Here, Respondent's Savings Clause states that the "claims not subject to arbitration under this policy" include "any claim under the National Labor Relations Act." The inclusion of such language does not, in and of itself, solve the underlying problems with the Arbitration Policy. The Board has rejected these savings clauses for at least two reasons. First, "[e]mployees would still reasonably believe that they were barred from filing or joining class or collective action, as the arbitration agreement would still expressly state that they waive the right to do so. Employees reasonably would find an assurance that they may do so anyway either confusing or empty…" *D.R. Horton*, 357 NLRB No. 84, slip op. at 7. Second, the Board has stated that including such language alongside an expressly unlawful rule, "[a]t best … creates an ambiguity, which must be construed against the Respondent as the drafter." *Murphy Oil*, 361 NLRB No. 72, slip op. at 19.

Although Paragraph C of the Arbitration Policy contains a savings clause, the clause does not cure the offending language in the earlier paragraphs. Reading Paragraph C in conjunction with Paragraph D and the New Hire Employment Acknowledgement Form creates an ambiguous and confusing standard for reasonable employees. By placing the clause within Paragraph C, Respondent is benefitting from the fact that a reasonable employee would have to read Paragraph B's list of covered claims and independently judge whether his claim falls within an exclusion. Paragraph C's reference to the Board is also extremely limited. The policy simply states that "any claim under the National Labor Relations Act" is not covered without providing any additional information to the employee to help them

differentiate what that means. Under this policy, employees are expected to parse through these words, evaluate the legal relevancy of their own personal dispute, and then decide whether the dispute is covered by the policy. This lack of information is evident when compared against Paragraph C's other sections. Each section of the paragraph provides information about the specific laws, except the one referencing the National Labor Relations Act. If the meaning of the language in the Arbitration Policy will be unclear to an average employee, the Board has held that "any ambiguity in the rule must be construed against the Respondent as the promulgator of the rule." *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992); see also *McDonnell Douglas Corporation*, 240 NLRB 794, 802 (1979). Consequently, the Arbitration Policy interferes with employees' access to Board processes and is overly broad and discriminatory, despite the ambiguous language included in Paragraph C.

c. Respondent's Enforcement Of The Arbitration Policy By Filing A Motion To Compel Arbitration Independently Violates The Act Because It Involves Enforcement Of An Unlawful Rule.

Because the underlying Arbitration Policy is unlawful, Respondent's motion seeking to enforce it is also unlawful as it further interferes with its employees' Section 7 right to engage in collective legal activity. It is axiomatic that the enforcement of an unlawful rule violates the Act. The Board has held that if the objective of the lawsuit in question is "unlawful under traditional NLRA principles, it can be condemned as an unfair labor practice." *Teamsters Local 776 (Rite-Aid)*, 305 NLRB 832, 834 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S.

959 (1993). As is the case here, when the sole objective of the Motion to Compel Arbitration is the enforcement of a work rule prohibiting employees from engaging in Section 7 activity, it is unnecessary to determine whether the motion was retaliatory or baseless. Based on this reasoning, Respondent's Motion to Compel Arbitration presents an independent and separate violation of Section 8(a)(1) of the Act.

2. Defenses Questioning the Validity of the D.R. Horton Case Should be Rejected

a. Any Affirmative Defenses Raised By Respondent That Relate To The Constitutionality Of The D.R. Horton Decision Fail Because The Decision Was Properly Issued And Substantively Valid.

If Respondent argues on brief that the *D.R. Horton* decision was enacted by an improperly constituted Board, that defense should be rejected based on the subsequent decision to fully adopt and reaffirm *D.R. Horton* in the Board's *Murphy Oil* ruling. See 361 NLRB No. 72, slip op. at 1. In *Murphy Oil*, the decision notes that arguments made against Member Craig Becker, who participated in the *D.R. Horton* decision, had been invalidly appointed or that his appointment had expired, were rejected by the Supreme Court in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). Moreover, any arguments criticizing the underlying rationale and substantive holdings in *D.R. Horton*, made in reference to the Federal Arbitration Act, should be disposed of under the Board's reasoning in *Murphy Oil*.

3. Affirmative Defenses Arising Under Section 10(b) of the Act Should Be Rejected

a. Section 10(B) Does Not Present A Valid Affirmative Defense Because The Arbitration Policy Has Been Maintained Within The Applicable 10(B) Period.

The Board should reject any affirmative defenses raised by Respondent asserting that the Board has no jurisdiction over the conduct described in the Complaint because Charging Parties are no longer employees or because the statute of limitations in Section 10(b) has expired. First, although the Charging Parties have not worked for Respondent within the 10(b) period, they remain statutory "employees" within the meaning of Section 2(3) of the Act. The Board has long held that an "employee" is a "member of the working class generally," including at times a "former employee of a particular employer." *Little Rock Crate & Basket Co.*, 227 NLRB 1406, 1406 (1977); see also *Waco, Inc.*, 273 NLRB 746, 747, fn. 8 (1984) (finding that a discharged employee remains a statutory employee entitled to the full protection of the Act).

Second, Charging Parties' allegations regarding the Arbitration Policy are not time-barred because Section 10(b) of the Act does not bar allegations in situations where an agreement is invalid on its face and maintained or invoked within the 10(b) period. See *Control Services*, 305 NLRB 435, 435 fn. 2, 442 (1991), enfd. mem. 961 F.2d 1568 (3d Cir. 1992); see also, *the Guard Publishing Co.*, 351 NLRB 1110, 1110, fn. 2 (2007). Finally, Respondent's Motion to Compel Arbitration was filed during the 10(b) period. For all the reasons stated above, none of the allegations stated in the Complaint are time-barred under the statute of limitations.

V. CONCLUSION

CGC seeks a ruling from the Board prohibiting the rules described above and addressing any consequences of Respondent's promulgation, maintenance and

enforcement of its unlawful rules in the Arbitration Policy. Specifically, CGC seeks a remedy which would require Respondent to cease and desist from maintaining and enforcing the alleged unlawful arbitration actions described in the Complaint, to rescind the unlawful rules described in the Complaint, and to notify current and former employees hired on or after June 1, 2003, that the rules have been rescinded. In addition to these measures, the CGC requests any other relief as may be just and proper to remedy the unfair labor practices alleged. The remedies described above are appropriate under Board law. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 21 (finding a violation and evaluating the appropriateness of similar measures).

Dated at Phoenix, Arizona, this 20th day of May 2015.

Respectfully submitted,

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